THE HONGKONG & SHANGHAI BANKING CORPORATION v. TANG HONG

[O.C.J. (Sutherland J.) March 27, 1958]

[J.B. — Civil Suit No. 18 of 1957]

Practice and Procedure — Pleading — Leave to amend — Discretion of Court.

Leave to amend is not readily granted where the opponents would be placed in a worse position than he would have been if the amended pleading had been delivered in the first instance.

In this case prejudice would result to the defendant were the amendment to be allowed. Application dismissed.

Facts appear sufficiently from the judgment.

Cases referred to:—

(1) *Bindeshani Prasad v. Lekhraj Sahu & Ors.*, A.I.R. 1916 Pat. 284.

(2) *Muthuveerappa Chetty v. Ramaswami Chetty & Ors.*, A.I.R. 1917 Mad. 607.

(3) *Clarapede v. Commercial Union Association* (1832), 32 W.R. 262.

(4) *Raleigh v. Goschen,* (1898) 1 Ch. 73, 81.

(5) *Australian Steam Navigation Co. v. William Howard Smith & Sons* (1889), 14 App. Cas. 318.

CIVIL SUIT.

C. L. Duff for the plaintiffs.

A. N. Mitra for the defendant.

Cur. Adv. Vult.

Sutherland J.: Enclosure (20) in this suit file was a contested Summons-in-Chambers whereby plaintiff applied for an order that plaintiff be at liberty to amend the plaint.

I did not find the matter a difficult one to resolve. However, the sums in issue are considerable and I am stating my views in full.

The plaint states that defendant owes plaintiff $824,024.85, balance for money advanced on overdraft account, and $193,863.65 for interest, and also claims ancillary relief. Attached to the plaint are two statements of accounts. The first headed Tang Hong New Account, under date 16th November, 1953, bears a debit entry being balance transferred from Tang Hong $345,366.84, Goh Hiang Chew $174,947.71, Lim Siew Hui $258,215.33 and Thein Kwi Kee $85,859.56 less $50,000 as on 7th March, 1953. The total of these debit items was entered as $864,389.44. There are a number of credit entries on the account, the total of which is $40,364.59. This credit total will be referred to later. The other account attached to the plaint is in the name of Tang Hong Interest Account and sets out various debits for interest on Tang Hong New Account, the entries running from 27th November, 1953 to 28th March, 1957 and totalling $193,863.65. This plaint was filed on 28th March, 1957 and was a summary suit. Defendant applied for leave to defend. In support, he affirmed that the plaint does not disclose the true position. Prior to 12th September, 1952 Chow See King was cashier of the plaintiff at Johore Bahru. Thein Kwi Kee is his wife. Prior to 12th September, 1952 there were accounts in the plaintiff bank at Johore Bahru in the name of the defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui. Chow See King, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui were defendant's friends, and the accounts were allowed overdraft facilities. On 12th September, 1952 cheques drawn by defendant on the Kwantung Provincial Bank, Singapore, were paid into defendant's current account, but were not paid.

On 15th September, 1952 plaintiff wrote to defendant advising him accordingly. The total amount of the cheques was $342,300 and plaintiff notified defendant that his current account was in debit to the extent of $345,366.84 which was demanded immediately. On the complaint of the plaintiff, a warrant was issued against Chow See King on a criminal charge soon after the 12th or 13th September, 1952. Defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui were called to the police station and subjected to interrogation on many occasions. Defendant was in a frightened state of mind. Rightly or wrongly, defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui might be involved in some criminal charge. Chow See King was charged under section 420 of the Penal Code for cheating plaintiff of $1,237,700, in Johore Bahru Sessions Court Criminal Case No. 73 of 1952. His case was first mentioned on 20th September, 1952 and the charge remained hanging in suspense. Meantime plaintiff was pressing for settlement of the overdrawn four accounts. In expectation that if settlement of the claim of plaintiff could be arrived at, plaintiff would not persist in his efforts to see that the prosecution against Chow See King was continued and that plaintiff would desist from launching any criminal prosecution against defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui, defendant agreed to undertake to discharge the liabilities of Thein Kwi Kee except $50,000 and the liabilities of Goh Hiang Chew and Lim Siew Hui.

Plaintiff gave defendant to understand that the criminal case against Chow See King would be withdrawn after defendant had signed an agreement acceptable to plaintiff. As the plaintiff gave defendant to understand that if defendant came to some arrangement acceptable to the bank to wipe out the liabilities arising out of all the four overdrawn accounts, the bank would not think of making any efforts for the continuation of the prosecution against Chow See King or of launching any prosecution against defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui, defendant signed an agreement on 7th April, 1953.

This agreement is headed: "Agreement for settlement of outstanding accounts." It commences: "In consideration of your forbearance to take proceedings against myself, Madam Thein Kwi Kee, Goh Hiang Cheow and Lim Siew Hui, I Tang Hong hereby agree as follows."

In the operative part of the agreement, Tang Hong undertakes liability to the bank for the whole of the amounts due on the four accounts abovementioned, with the exception of $50,000 part of the account of Thein Kwi Kee. The balance of the amount due by Thein Kwi Kee and the whole of the amount due by Goh Hiang Cheow and Lim Siew Hui and defendant to be transferred to a new loan account to be called "Tang Hong New Account." A separate interest account was to be opened in the name of "Tang Hong Interest Account". Defendant would transfer to the bank's nominees on demand by way of security 220,000 fully paid shares in Wing Hong Sawmill Co., Ltd. Benefits in respect of the shares would be paid to the bank in reduction of Tang Hong New Account. Defendant guaranteed that the Company would pay an interim dividend monthly which would provide not less than $5,000 every month and defendant would make good any deficit upon demand. Among other terms, the agreement specified that defendant would sell his property at Wareham Road and proceeds after payment of costs would be paid to the credit of Tang Hong New Account. If the Tang Hong New Account is reduced by not less than $60/00 (Counsel agreed that this was an error and should be $60,000) in every year and the whole thereof is discharged within 15 years the bank would consider the question of waiving all or part of the money owing on Tang Hong Interest Account. Finally, the bank reserves the right of calling up the whole of the moneys due on the Tang Hong New Account and the Tang Hong Interest Account on demand at any time.

Defendant contended that as there was coercion and as the consideration (stifling criminal prosecution or intended criminal prosecution) was illegal the agreement is void. Further, he contended that there is inconsistency between the first part of the agreement and clause 12 thereof and that the earlier part should prevail. The consideration was that no criminal prosecution should be launched or continued against Chow See King and the other four persons and that defendant should be given 15 years to pay off the liabilities. Defendant has confirmed a number of the undertakings in the agreement, e.g. transfer of 220,000 shares and his undertaking in clauses 5, 6 and 8 of the agreement. The action was also premature as no formal demand calling up the moneys due on the Tang Hong New Account and the Tang Hong Interest Account had been made prior to the institution of the suit.

An affidavit was filed by the solicitor for the plaintiff, that in about October, 1952 the Deputy Public Prosecutor, Johore Bahru was in charge of the intended prosecution and withdrew it at about that time. In April, 1953 therefore plaintiff was in no position to influence the criminal proceedings. It would not be illegal not to disclose acts which might amount to an offence under section 420. Plaintiff did not coerce defendant into signing the agreement on the 7th April, 1953. Defendant was represented by his legal advisers. About March, 1953 defendant admitted that he had the benefit of all the moneys represented by the said overdrafts with the exception of $50,000 and accepted liability to plaintiff for the full amount less than $50,000. Even if there had been coercion, coercion is not a sufficient ground to avoid this agreement. Plaintiff's solicitors made a demand calling on defendant to settle the account on 21st February, 1957. In the letter plaintiff's solicitors demanded payment on or before 28th February, 1957 of $4,000 due in respect of payment for January and February and demanded a satisfactory undertaking that at least $2,000 per month would be paid until the overdrafts were liquidated. In default, action would be taken at once to enforce plaintiff's rights without further notice.

Defendant has partly confirmed the agreement.

Defendant replied that on the 2nd December, 1952, proceedings were stayed on the charge

and an order of discharge was made not amounting to acquittal. On 28th November, 1953 (and it should be stressed that this was the next year) the charge against Chow See King finally was withdrawn by the prosecution and he was acquitted. The criminal charge remained in suspense for more than a year.

Unconditional leave was granted to the defendant to appear and defend the suit.

In his defence defendant raised many of the points previously set up by him in his application for leave to defend, and I do not propose to state them all.

Soon after 12th September, 1952 plaintiff threatened to take criminal proceedings against defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui and threatened to continue the criminal proceedings against Chow See King and implicate these four persons in the criminal proceedings already commenced against Chow See King. Plaintiff put pressure on the defendant to undertake liabilities arising on the overdraft accounts of defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui and gave assurance to defendant that if he would enter into any undertaking to settle the liabilities arising on the four overdraft accounts no criminal prosecution would be launched against defendant, Thein Kwi Kee, Goh Hiang Chew and Lim Siew Hui and that the criminal prosecution against Chow See King would be withdrawn. Defendant signed the agreement on the 7th April, 1953. The terms of this agreement have already been referred to. Defendant contended that this agreement is illegal and that the defendant's indebtedness under Tang Hong New Account and Tang Hong Interest Account is void. Plaintiff has collected from defendant $40,364.59 under the said illegal agreement and, has obtained from defendant transfer of his 220,000 fully paid shares in Wing Hong Sawmill Co., Ltd., for securing the sum of $864,389.44. Plaintiff re-transferred 100 fully paid shares in the said Company to defendant and plaintiff still holds 219,900 shares as security for the illegal debt of $864,389.44.

Alternatively, defendant contends that plaintiff is not entitled to sue on the Tang Hong New Account and Tang Hong Interest Account until the lapse of 15 years from the date of the agreement. Defendant contended in the alternative, further, that plaintiff not having called up the moneys due on the Tang Hong New Account and Tang Hong Interest Account, plaintiff's suit is premature.

Defendant counterclaimed for a declaration that the agreement dated 7th April, 1953 and Tang Hong New Account and Tang Hong Interest Account are void. He also counterclaimed that plaintiff refund to defendant $40,364.59 received by plaintiff to account of Tang Hong New Account; also that plaintiff re-transfer the 219,900 shares.

Plaintiff denied that it verbally threatened to take criminal proceedings or to continue criminal proceedings, and denied that it gave assurance about criminal prosecutions. Plaintiff denied that defendant signed the agreement on the alleged date and denies pressure and coercion. In any event defendant is now estopped from denying the validity of the agreement because he has partly performed it since the alleged duress terminated.

On the 3rd August, 1957 the Assistant Registrar gave notice to defendant that application had been made by plaintiff to have the suit set down in the hearing list for September, 1957. On 19th December, 1957, the Summons-in-Chambers, which gave rise to the present hearing, was issued on the application of plaintiff for an order that plaintiff be at liberty to amend the plaint; the proposed amended plaint claimed for money payable by defendant to plaintiffs for money lent and for money paid by plaintiffs for defendant as bankers and agents for defendant at his request. Full particulars were set out in the Statement of Account attached to the proposed amended plaint. Short particulars are:

1952 September 15. $345,366.84.

Attached to the proposed amended plaint is a statement of account showing, *inter alia*, the entries:

Date	*Particulars*	*Cheque No.*	*Withdrawals*	*Deposits*	*Balance*
15 Sep 52	To Chqs. paid in by you on 12.9.52 Retd. Unpd.		$342.500.00		
		674	$ 3,000.00		$345,366.84 DD
16 Nov 53	By Dr. Balance transferred to Tang Hong New A/C. as on 7.11.53			$345,366.84	.00 CR

In support of this application for amendment an affidavit was filed by the Manager of the plaintiff that in order to clearly define the issues it is necessary that the plaint be amended as proposed, and that it is essential to the plaintiff's case that the amendments be made.

Defendant strongly opposed the proposed amendment, affirming that the application at this late stage is not *bona fide* and was motivated by apprehension that defendant may succeed in

establishing the allegations of pressure and coercion and that plaintiffs realising the illegality of the agreement and that the claim of $824,024.85 and $193,863.65 must fail, is trying to change the nature of the case entirely.

At the hearing of the application to amend, counsel for plaintiff referred to the agreement in writing by defendant to be responsible for the other amounts. He conceded that there was nothing in the original plaint about this, there was a grave error by plaintiff in not putting his whole claim forward, and that the claim should have been on the agreement. He stated it is the intention of plaintiff to sue on the agreement at a later date. He cited the Annual Practice 1956 at p. 454 that amendment should be allowed if it can be made without injustice to the other side.

Counsel for defendant urged that the old debt has been superseded by the agreement. There has been a transfer to the new loan account and the old debt is settled. Plaintiff agreed to the substitution of the agreement for the old account. The real issue is, was the agreement valid? Defendant counter-claimed for shares. The claim is changed. The amended claim is for $345,000 odd. But in plaintiff's own ledger this has been transferred to Tang Hong New Account, and this is one of the figures in the new account. The old account no longer exists — it is merged in the Tang Hong New Account. This is a late application to amend. Counsel contended that the grounds for the application to amend, namely, in order to clearly define the issues, are not tenable.

I may say that, whatever may be the actual reason for the application to amend, it appears to me that it will change the issues completely. The original claim was for $824,024.85 and $193,863.65 which, *ex concessu*, should have been on the agreement. The amended claim is for $345,366.84, payable for money lent, and for money paid by plaintiff for defendant as bankers and agents for defendant at his request. The claim as originally framed and the amended claim as proposed appear to me quite clearly to raise different issues. The crucial issue on the original claim was the agreement. This issue does not arise under the proposed amended claim.

Counsel for defendant submitted that if the Court approves the defendant's contentions as to the agreement, the whole claim will fail — the $345,000 is merged in the $824,000. The amendment is not necessary to the plaintiff's case which was on the agreement.

It appears to me that there is force in the submission that the amendment is not necessary to the plaintiff's case which was on the agreement. As the plaintiff's case was admittedly based on the agreement, how can it be said that the proposed amendment, which ignores the agreement, is essential to the plaintiff's case, as alleged by the plaintiff?

Counsel submitted that there was no *bona fides* in the application. He further submitted that the counterclaim should not be prejudiced, and it is an unquestionable fact that if the amendment is permitted, the ground on which the counterclaim stands will be cut away. Counsel's view was that this is why plaintiff wants to ignore the agreement. He pointed out that no further affidavit has been filed by plaintiff in reply to the defendant's contentions. It is not a matter which could be compensated for by costs. The real question cannot be raised by the amendment because the real question is the agreement.

Here again, there appears to be cogency in this argument.

Counsel referred to sections 24, 25 and 63 of the Contracts (Malay States) Ordinance, 1950 and submitted that the whole debt will fail if the agreement is void. Accordingly the defence will be prejudiced if the amendment is allowed. He cited *Bindeshani Prasad v. Lekhraj Sahu & ors.*,[1] that an agreement to compound a non-compoundable offence is wholly void. Also *Muthuveerappa Chetty v. Ramaswami Chetty & ors.*[2] that there should be refund even of a debt really due, if it was paid under an illegal agreement. If the amendment is allowed the question of illegality and refund due cannot be tried.

This submission appeared to me to be a powerful one.

Counsel opposed the application mainly on two grounds, first want of *bona fides* and secondly injustice. Page 456 of the Annual Practice 1956 is authority for the proposition that leave is not readily granted where the opponent would be placed in a worse position than he would have been if the amended pleading had been delivered in the first instance.

Counsel finally submitted that the intention was to obviate issues and that harm will be done to the defendant.

Counsel for plaintiff in reply on the question of *bona fides* stated that the pleading was prepared by a person of less than three years'

standing as an advocate and solicitor, but it would appear to me that defendant has, and was entitled to, put before the Court the agreement. Otherwise the pleadings could not be characterised as frank and would not disclose the true position to the Court. Resulting from this, defendant has (whether justifiably or not the Court is not yet in a position to judge) made a claim in respect of this agreement, and he should not be jeopardised by the error of plaintiff's counsel. I, of course, make no comment on the merits or otherwise of defendant's claim that the agreement is void. This claim will have to abide trial. Counsel asked how could prejudice arise when the amount is reduced, but this argument appeared to me to be lacking in strength when, in the circumstances of this case, the prejudice to the defendant arose out of the very fact that defendant's case was based on the facts of the original claim and that the reduction of the amount *ipso facto* caused the disappearance of the defendant's case.

How, then, stand the authorities?

Odgers on Pleading and Practice, 15th edition, page 167 states:—

"As a general rule either party is allowed to make any such amendment as is reasonably necessary for the due presentation of his case" (and I would stress the words "his case") "on payment of the costs of and occasioned by the amendment provided there has been no undue delay on his part" (in the present case, having regard to the time which elapsed before the application to amend, such application cannot in my view be characterised as a prompt one, although this may not be fatal to the application) "and provided also the amendment will not injure or affect any vested rights of his opponent."

In my view the proposed amendment will injure defendant's vested rights for the reasons above stated.

In *Clarapede v. Commercial Union Association*,[3] Brett, M.R., says:

"However negligent or careless might have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but if the amendment will put them into such a position that they may be injured it ought not to be made."

I would say that the amendment ought not to be made because defendant may be injured by it. *Odgers* continues that if the application be made *mala fide* or if the proposed amendment will cause undue delay or will in any other way unfairly prejudice the other party, or is irrelevant or useless or would raise merely a technical point leave to amend will be refused.

In my view in this case allowance of the amendment would occasion unfair prejudice to the defendant for the reasons already given.

Odgers further states that where the action has been brought on a substantial cause of action to which a good defence has been pleaded the plaintiff will not be allowed to amend his claim by including in it for the first time a trivial or merely technical cause of action which such defence may not cover. Annual Practice 1956, p. 459 states that the Court will refuse to allow an amendment where the amendment would change the action into one of a substantially different character which would more conveniently be the subject of a fresh action or where a claim has been abandoned.

In *Raleigh v. Goschen*[4] at p. 81 Romer, J., states:

".....and the only further question I have to consider is whether I ought to give the plaintiff leave to amend as asked by them. On consideration I think I ought not; for what the plaintiffs are seeking to do is to change one action into another of a substantial character. Apart from the fact that the present action cannot be sustained, while the other might lie, an action against the defendants in their official capacity, supposing it to lie, would differ in most material respects from an action against them as individuals....."

After considering the relevant authorities I have come to the conclusion that the application to amend should, in the exercise of my discretion (see *Australian Steam Navigation Co. v. William Howard Smith & Sons*[5]) be refused with costs to the defendant in any event. In my view prejudice would result to the defendant were the amendment to be allowed.

Application refused.

Solicitors: *Donaldson & Burkinshaw*; *Mitra & Co.*

MOHAMED DAUD BIN HAJI MOHAMED TAHIR v. HABIBAH BINTI BADU RAHMAN & ORS.

[O.C.J. (Good J.) March 5, 1958]

[Ipoh — Probate Suit No. 1 of 1957]

Probate and Administration — Matter started as a petition for letters of administration — Entry of caveat — Uncontentious business becoming contentious matter — Petition converted into contended probate suit — Failure to renew caveat — Effect of — Rules for Non-Contentious Business in the Supreme Court in its Probate Jurisdiction (G.N. No. 2179/16 as renumbered by G.N. No. 2096/27), rr. 54 and 55.